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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 909

GIFFEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, SEABRIGHT-OSWEGO FALLS CORPORATION, and UNION PACIFIC RAILROAD COMPANY, *Petitioners*,

v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor-Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

GIRTEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, SEALRIGHT-OSWEGO FALLS CORPORATION, and UNION PACIFIC RAILROAD COMPANY, *Petitioners*,

v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas entered in the above case in an original proceeding in that Court.

OPINION BELOW

The opinion of the Supreme Court of Kansas is reported at 186 Kan. 190, and is printed at Appendix

A, *infra*. The report of the Commissioner appointed by the Supreme Court of Kansas, as amended, which is unreported, is printed at Appendix B, *infra*.

JURISDICTION

The order of the Supreme Court of Kansas dismissing the action was issued on March 5, 1960. (App. A, p. 2a) Petitioners sought no rehearing. A motion for rehearing was timely filed by respondent Quindaro Township, and that motion was denied on April 13, 1960. (R. 222) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law under the Fourteenth Amendment when they were refused the right to challenge, or to have challenged on their behalf, the legality of municipal ordinances purporting to annex their property to a municipality so as to subject it to the taxing and regulatory authority of that municipality when under state law the legality of the ordinances cannot subsequently be challenged by petitioners in resistance to the taking of their property by municipal taxation and regulation.

2. Whether petitioners were denied the equal protection of the laws guaranteed by the Fourteenth Amendment when the Supreme Court of Kansas permitted the Attorney General of Kansas to dismiss as a matter of absolute right the only proceeding whereby a judicial determination could be secured as to the legality of municipal ordinances purporting to annex the property of petitioners so as to subject it to the taxing and regulatory authority of a municipality, when the sole ground relied on in the Attorney

General's motion to dismiss was the fact that two prior actions had been maintained challenging previous ordinances purporting to annex petitioners' property, each of which actions had resulted in a judicial decision that the ordinances were illegal and void.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioners are the owners of real and personal property in Quindaro Township, Wyandotte County, Kansas, in an area known as the Fairfax Industrial District, which adjoins Kansas City, Kansas.

Under the law of Kansas municipalities such as Kansas City possess only such powers as are conferred upon them by the legislature of the State. The Kansas legislature has delegated to such municipalities a portion of its legislative authority to provide for the annexation by a municipality of property lying outside its borders. Kansas G.S. 1959 Supp., Sec. 13-1602a. The authority delegated is limited and conditional, and any purported annexation by a municipality is under Kansas law invalid unless the terms of the enabling statute are adhered to. See *Atchison & N. R. Co.* v. *Maquilkin*, 12 Kan. 301, 304 (1873).

For a number of years, the municipal authorities of Kansas City have sought to annex to that municipality

parts of the Fairfax Industrial District which include property belonging to petitioners. The first two attempts failed. In each case the municipality passed ordinances purporting to annex the territory pursuant to the statutory authority above described, and in each case, upon *quo warranto* proceedings brought on the relation of state officials as original actions in the Supreme Court of Kansas, the ordinances were declared by the Supreme Court to be wholly invalid and unlawful, because not within the authority delegated by the state legislature to the municipality. See *State ex rel. Fatzer* v. *Kansas City,* 169 Kan. 702, 222 P.2d 714 (1950); *State ex rel. Martin* v. *Kansas City,* 181 Kan. 870, 317 P.2d 806 (1957).

These setbacks did not, however, deter the Kansas City municipal authorities, who thereafter enacted and promulgated six additional ordinances purporting to annex portions of the Fairfax Industrial District, including a portion of the property of each of the petitioners situated therein. On the relation of the county attorney of Wyandotte County, *quo warranto* proceedings were promptly once more instituted in the name of the State of Kansas, naming the City, three of its officials, and Quindaro Township as defendants. The City and its officials answered, admitting a major portion of the complaint, including the allegations as to the invalidity of two of the six ordinances involved, and joining issue on the remainder of the complaint. In accordance with state practice the case was referred by the Supreme Court to a Commissioner for the taking of evidence.

On July 22, 1959, the Attorney General of Kansas, who theretofore had taken no part in the proceedings, filed motions to intervene and to supersede the county

attorney as relator, to strike all pleadings filed by Quindaro Township on the ground that the township had no justiciable interest in the controversy, and to dismiss the *quo warranto* proceeding. The sole ground stated in support of the motion to dismiss was that in view of the expense of the prior litigation had in connection with the two prior illegal attempts at annexation, it would not be in the public interest to continue the action.

Quindaro Township opposed each of these motions, pointing out that the case was ready for trial before the Commissioner on the merits and that the design of the Attorney General's attempted action was to prevent a judicial determination of a concededly justiciable controversy. On a hearing on the motions before the Commissioner, the township also noted that the Governor of Kansas had formally directed the Attorney General to proceed with the case in order that substantial rights should not be forfeited without a hearing, and argued that under these circumstances the Attorney General had no authority to dismiss the action.

At the same time petitioners, who had until then considered their interests to be adequately represented by the county attorney, filed applications to intervene in the case. The applications alleged that if the disputed ordinances were permitted to go into effect petitioners would be subjected to the burden of city taxes, regulation and control, and that to permit the permanent frustration of a judicial determination of the question of the validity of the ordinances would thus be to deny to them due process of law under the Fourteenth Amendment. The applications further

alleged that to grant the Attorney General the arbitrary and unlimited power to decide whether private rights would be made the subject of judicial determination would deny to petitioners the equal protection of the laws in contravention of the Fourteenth Amendment. They asked that the Attorney General be compelled to continue the action to a decision on the merits, or that petitioners be permitted themselves to maintain the action as relators for the State of Kansas, in order that their rights might be judicially determined.

The Commissioner ruled that the Attorney General had no authority to supersede the county attorney or to dismiss the action. Accordingly, he denied petitioners' motions to intervene on the ground that their interests would be adequately protected by having the *quo warranto* action go forward between those already parties thereto.

The Supreme Court of Kansas rejected the Commissioner's ruling that the Attorney General was not empowered to supersede the county attorney and held that he might make this supersession and proceed immediately to dismiss the action. It further held that Quindaro Township had no authority to continue the action on its own behalf. Finally, it denied petitioners' applications to intervene, which had been renewed before it, on the ground that under Kansas law a proceeding to test the validity of a city's attempt to extend its boundaries can be maintained only by the State, acting on the relation of public officials.[1]

---

[1] The Supreme Court of Kansas had previously held that an action questioning the legality of a municipal ordinance annexing territory could be prosecuted only in the name of the State, at the instance of a county attorney or the Attorney General. Smith v. City of Emporia, 168 Kan. 187, 211 P.2d 101 (1949).

The effect of these rulings was altogether to preclude a decision as to the legality of the challenged ordinances and to subject petitioners to a taking of their property by municipal taxation and regulation even if that taxation and regulation is in violation of law.

Petitioners' claims of denial of due process and equal protection under the Fourteenth Amendment were made explicitly in their original applications to intervene (R. 94, 113, 147-148, 167-168), were renewed in their brief on the Attorney General's appeal from the Commissioner's decision to the Supreme Court (See Brief on Behalf of Petitioners to Intervene, R. 209, pp. 4-11), and were adverted to and rejected by the Supreme Court in its opinion (See App. A, pp. 12a-13a). Accordingly, this Court has jurisdiction to pass upon these claims.

REASONS FOR GRANTING THE WRIT

The decision of the Kansas Supreme Court has denied to petitioners a fundamental right guaranteed them by the due process clause of the Fourteenth Amendment—the right to be heard as to the legality of the taking of their property at some point before that property is irretrievably lost.

Petitioners are seeking in this case to secure an adjudication as to the validity of municipal ordinances purporting to annex their property to a municipality. The concrete and substantial effect of the ordinances upon petitioners is clear. The adjudication which they seek is one of a concededly justiciable issue. Indeed, at the time of the intervention by the Attorney General the issue was about to be adjudicated on the

merits. There is no other form of proceeding in which petitioners or anyone else can raise this issue in the Kansas courts, now or at any future time. See *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P.2d 101 (1949); *Smith* v. *City of Prairie Village*, 175 Kan. 469, 264 P.2d 1053, 1055 (1953). If petitioners are not now permitted to secure a judicial determination as to the legality of the ordinances they will be wholly without a remedy when the City of Kansas City takes their property by taxation, although that taking is unlawful unless the ordinances of annexation are valid.

It will hardly be denied that to permit a municipal corporation to impose taxes upon petitioners without warrant in law would be a taking of property in violation of the due process clause. *Cincinnati* v. *Louisville & N. R. Co.*, 223 U.S. 390, 400; *Portland Ry., Light & Power Co.* v. *City of Portland*, 181 Fed. 632 (C.C.D. Ore. 1910), *appeal dismissed*, 218 U.S. 686. If the ordinances are valid petitioners have no basis for complaint. On the other hand, if they are invalid, and petitioners are given a judicial hearing on the merits of their claim of invalidity, the illegality of the ordinances will be determined by the Supreme Court of Kansas, as has been done in many prior Kansas cases. The substance of petitioners' position is that to deny them any opportunity for a hearing on the question of illegality, as the court below did, is to deny them due process of law.

In rejecting petitioners' contention that the due process clause entitled them to be heard, either in person or through a representative of the State, on the question whether the ordinances were within the authority conferred on the municipality by the legislature, the Kansas Supreme Court relied on the

proposition that "a state legislature has absolute power to make and change subordinate municipalities such as counties, towns and school districts because they are auxiliaries of the state." (App. A, p. 12a) The difficulty with this proposition as a rule of decision in this case is that it is wholly unresponsive to the issue sought to be tendered by petitioners.[2] Petitioners have throughout this litigation conceded, and now concede, that had the legislature of Kansas passed a statute in precisely the same language as that of the ordinances here sought to be attacked, they would have no basis for complaint. In such circumstances they would have no right to a hearing because there would be nothing to hear. See *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 709-710. This is not because under these circumstances there would be no deprivation of petitioners' property, but because a valid legislative enactment can work such a deprivation consistent with due process of law. See *Davidson* v. *New Orleans*, 96 U.S. 97. This is the basis of such cases as *Kies* v. *Lowrey*, 199 U.S. 233, and *Hunter* v. *Pittsburgh*, 207 U.S. 161, relied on by the court below.

The question as to which petitioners seek to be heard is whether the conditions necessary for the rule above stated to come into play are here present. The validity of the ordinances here sought to be attacked depends entirely on whether they were passed as an exercise of powers delegated to the City of Kansas City by the legislature of Kansas. For in Kansas, as elsewhere,

[2] The proposition itself is subject to some limitations. See Mount Pleasant v. Beckwith, 100 U.S. 514, 533. Compare Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959), *cert. granted*, 28 U.S.L. Week 3271, March 22, 1960.

municipal corporations possess only such powers as are conferred upon them by the State. See *State* v. *Hannagan,* 161 Kan. 492, 170 P.2d 138 (1946); *Russell State Bank* v. *Steinle,* 159 Kan. 293, 153 P.2d 906 (1944); *Kansas Gas & Elec. Co.* v. *City of McPherson,* 146 Kan. 614, 72 P.2d 985 (1937), *appeal dismissed,* 303 U.S. 624. The legislature of Kansas has concededly not delegated to the municipalities of that State all the powers which it possesses in the field of annexation or change of municipal boundaries. Were petitioners to be permitted a hearing on the question whether the ordinances are consistent with the enabling statute, or were the Attorney General required to litigate that question on their behalf, adjudication by the Kansas Supreme Court that the ordinances were not in fact within the statute would have the effect under Kansas law of rendering the City powerless to tax or to regulate petitioners' property. This in fact was the result of two previous attempts by the municipality to accomplish an annexation of petitioners' property by ordinance. *State ex rel. Fatzer* v. *Kansas City,* 169 Kan. 702, 222 P.2d 714 (1950); *State ex rel. Martin* v. *Kansas City,* 181 Kan. 870, 317 P.2d 806 (1957).

Had the Supreme Court of Kansas ruled that the action of the City of Kansas City was within the powers delegated to it by the state legislature, this would have ended the matter so far as this Court is concerned. The Supreme Court of Kansas, however, did not so rule. Its holding rather was that if the Attorney General in his sole discretion and for any reason decided to prevent adjudication of this question, petitioners are utterly without remedy. This result is plainly inconsistent with holdings of this

Court that even in an area of regulation where a state legislature has plenary authority, if the legislature does not delegate full legislative power but rather makes a conditional grant of power, one whose rights are affected by a purported exercise of the delegated power is entitled to a hearing as to the validity of that exercise. *Embree* v. *Kansas City Road District*, 240 U.S. 242, 247; *Browning* v. *Hooper*, 269 U.S. 396, 405-406; *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 166-167, 174-175; *Parsons* v. *District of Columbia*, 170 U.S. 45, 52. See also *Southern Ry. Co.* v. *Virginia*, 290 U.S. 190, 197.

The decision below, which denies to petitioners a judicial determination of the question whether the authority which purports to take their property is lawfully exercised, thus deprives petitioners of due process of law, which in its procedural aspect requires, minimally that one whose property is to be taken shall have the right to be heard as to questions which are admittedly decisive as to the validity of the taking.

The result of the decision of the Kansas Supreme Court is also to deny to petitioners the equal protection of the laws of Kansas, by depriving them of a remedy available to others similarly situated. For under Kansas law property owners affected by the promulgation of municipal ordinances purporting to annex their property and to subject it to the taxing and regulatory authority of the annexing municipality are not always without a remedy to test the validity of the ordinances. Their rights traditionally are asserted in the name of the State itself, acting upon the relation of the county attorney or the State Attorney General, and this mode of proceeding, if carried to

judgment on a truly adversary basis, would appear sufficient to meet the requirements of procedural due process as to petitioners.[3]

The Kansas court has here held, however, that the availability of this remedy to petitioners is a matter to be determined conclusively and finally by the *ex parte* decision of the State Attorney General. It has ruled that that officer has "an absolute right to dismiss the action" (App. A, p. 13a), and thus to frustrate at the last moment a judicial determination of the merits of petitioners' claim as to the invalidity of the ordinances at issue.

Petitioners submit that this extraordinary rule permits, and has here resulted in, precisely the sort of arbitrary and invidious discrimination which the equal protection clause is designed to prevent.

A statement of the reason given by the Attorney General for his decision to dismiss the action demonstrates the constitutional invalidity of the classification which it implies. In his motion to dismiss the Attorney General stated, in the words of the court,

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[3] Representatives of the State have in a large number of cases instituted and maintained proceedings challenging the exercise of authority by municipalities on the ground that that authority has not been validly conferred upon them. See, *e.g.*, State *ex rel.* Forsyth v. City of Chanute, 179 Kan. 155, 292 P.2d 687 (1956); State *ex rel.* Hawks v. City of Topeka, 176 Kan. 240, 270 P.2d 270 (1954); State *ex rel.* Martin v. Tucker, 176 Kan. 192, 269 P.2d 447 (1954); State *ex rel.* Gray v. Board of Education, 173 Kan. 780, 252 P.2d 859 (1953); State *ex rel.* Hawks v. City of Topeka, 175 Kan. 488, 264 P.2d 901 (1953); State *ex rel.* Hawks v. City of Topeka, 173 Kan. 387, 246 P.2d 250 (1952). And as mentioned above, ordinances purporting to annex the very property here involved have twice been declared unlawful by the Kansas Supreme Court upon challenge by the public authorities.

that "in view of the expense to the taxpayers of past litigation on this annexation problem of the city, it would be in the public interest to terminate and dismiss the present action." (App. A, p. 3a)

Petitioners do not believe that a classification consistent with the equal protection clause can be made between persons who have twice previously been subjected to the attempted taking of their property by ordinances declared by the state's highest court, upon challenge, to be illegal, and persons who are subjected for the first time to the threat of an annexation which they believe to be unlawful. Although the equal protection clause permits classification when based on any actual distinction germane to the basis of the classification, it cannot tolerate a distinction which places a premium on repetition of illegality, and penalizes petitioners because they have been the near victims of illegality in the past.[4]

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[4] In his brief before the Supreme Court of Kansas the Attorney General suggested that his exercise of his absolute right to dismiss rested on consideration of "the welfare of the State as a whole, whose people have a concern lest the natural expansion of their second largest city be unduly hampered and lest those who have the benefits of a great urban center refuse to contribute fairly to their cost." (Brief of John Anderson, Jr., Attorney General of the State of Kansas, R. 207, p. 40) In a society based on government under law, it is hardly consistent with the equal protection clause for some persons to be denied access to the courts to contest illegal action because an executive official believes that in the particular case it is in furtherance of "the welfare of the State as a whole" to have the illegality go unredressed.

Finally, in his reply to a Motion for Rehearing filed in the Kansas Supreme Court by Quindaro Township, the Attorney General suggested that his dismissal rested in part on his conviction that the ordinances in question were valid. But "to one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process

Even had the Attorney General not explicitly disclosed the invalid standard applied by him in discriminatorily denying petitioners the opportunity for a judicial determination of the legality of the ordinances, the very fact that the decision below has made petitioners' right to such a determination depend wholly on the decision of an executive official, acting *ex parte* and without limitation upon the range of his discretion, in itself is a denial to petitioners of any meaningful equality under the law. The Attorney General argued to the Kansas Supreme Court that his right to dismiss was unconditional, and the court so ruled. Where, as here, substantial private rights are at stake the opportunity for access to the courts may not, consistent with the Fourteenth Amendment, be thus accorded to some and denied to others in the unfettered discretion of a public official. Compare *Cochran* v. *Kansas*, 316 U.S. 255; *Griffin* v. *Illinois*, 351 U.S. 12.

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of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works, 237 U.S. 413, 424. And even this statement, which plainly has "the usual infirmity of *post litem motam*, self-serving declarations", United States v. Rumely, 345 U.S. 41, 48, was coupled with another reference to the fact that the City had in the past been "harassed" by having to litigate in defense of ordinances which were found in the litigation to be illegal and void. Further, it is in striking contrast to the judicial admission of the City itself that two of the ordinances here involved are in fact unlawful.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 41,072

STATE OF KANSAS, ex rel. Robert J. Foster, County Attorney of Wyandotte County, Kansas, *Plaintiff*

v.

THE CITY OF KANSAS CITY, KANSAS, a municipal corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, Wyandotte County, Kansas, a body politic and corporate, *Defendants*

PHILLIPS PETROLEUM COMPANY, a corporation;
UNION PACIFIC RAILROAD COMPANY, a corporation;
SEALRIGHT-OSWEGO FALLS CORPORATION, a corporation; and
GIRTEN INVESTMENT COMPANY, a corporation,
Petitioners for Leave to Intervene

Syllabus by the Court

QUO WARRANTO—*Attorney General Officer of Court—Right to Intervene and Dismiss.*

In an original proceeding in quo warranto commenced by the state, on the relation of the county attorney, a motion by the attorney general to intervene, supersede and dismiss, as is more fully narrated in the opinion, is considered and it is *held:* The corporations petitioning for leave to intervene are not proper parties (*Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 101); the attorney general is entitled to intervene and supersede the county attorney in this court in cases involving the state or public interest; the attorney general, as an officer of this court, has the duty to limit his conduct to that

prescribed by the code of professional ethics, and the governor, as principal executive officer of the state, cannot control the officers of this court, which heads up the judicial branch of our state government; the right of the attorney general, as plaintiff, to dismiss this action is absolute and the township, one municipality, cannot question the organization, or reorganization, of the city, another municipality, because that can only be done by the state through its proper officers. It is further *held*, the case is dismissed.

Original action in *quo warranto*. Opinion filed March 5, 1960. Dismissed.

The opinion of the court was delivered by

ROBB, J.: This original proceeding in quo warranto commenced by the state, on the relation of the county attorney, seeks to test the validity of certain ordinances of the city of Kansas City by requiring the defendant city officials, Mitchum, Swarner, and Regan, in their official capacity, to show by what authority they assumed a portion of the Fairfax Industrial district and made it part of the city when they enacted and published certain ordinances annexing such land.

Two previous original quo warranto proceedings of similar character have been before this court. (*State, ex rel.*, v. *City of Kansas City*, 169 Kan. 702, 222 P. 2nd 714; *State, ex rel.*, v. *City of Kansas City*, 181 Kan. 870, 317 P. 2nd 806.)

The state filed its amended and supplemental petition naming the city, Mitchum, Swarner, Regan, and Quindaro township as defendants. On October 8, 1958, Quindaro township filed its answer admitting the allegations of the petition and referring in detail to the two previous cases above mentioned. It attacked the city's efforts to annex by ordinances the land in question, which is a part of Quindaro township. On October 28, 1958, the city and its named officials (hereafter referred to collectively as the

city) by way of answer filed a general denial of the affirmative allegations in Quindaro's answer and a general demurrer thereto was incorporated into its answer. On the same day the city, in answer to the amended and supplemental petition of the state, admitted a major portion thereof and joined issue on the remainder. On November 13, 1958, the state filed a lengthy reply to the answer of the city. Since the merits of the case are not before us at this stage of the proceedings, we shall not detail the above-mentioned pleadings.

The parties failed to agree upon a stipulation of facts and as a result of a renewed application dated April 22, 1959, for appointment of a commissioner, this court on June 30, 1959, appointed the Honorable Jay W. Scovel of Independence, Kansas, as commissioner to hear the evidence, which procedure was the same as that followed in the two earlier cases previously referred to.

Donald E. Martin's term of office as Wyandotte county attorney expired in January, 1959, and his newly-elected successor, Robert J. Foster, assumed the duties of the office including the substitution of his name for that of Martin in this case. On July 22, 1959, the attorney general, under the directive set forth in the first part of G. S. 1949, 75-702 (later quoted herein) filed a motion to intervene in the case, to supersede county attorney Foster, and to strike all references in the pleadings to Quindaro township, as well as its answer and cross petition, because the township had no justiciable interest, it was neither a necessary nor proper party, and its answer and cross petition had no lawful place in the proceeding. The attorney general further moved that in view of the expense to the taxpayers of past litigation on this annexation problem of the city, it would be in the public interest to terminate and dismiss the present action.

Acknowledgment of service by Foster was as follows:

> "The undersigned County Attorney of Wyandotte County, Kansas, hereby acknowledges receipt of a copy of the foregoing Motion and states and *he has read the same and lodges no objection to supersession by the Attorney General in such action.* [Our emphasis].
>
> "/s/ ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas. Kansas City, Kansas."

After service on it, Quindaro filed a formal objection to the attorney general's intervention because the matter was ready for trial before the commissioner and the attempted supersession was only to prevent submission of the controversy and prevent judicial determination of the rights of thousands of people.

At the same time Quindaro also filed its formal objection to the attorney general's motion to dismiss because if granted such motion would prevent Quindaro from furnishing essential government services to its 17,674 residents by permitting the ordinances under attack to stand as valid. The attorney general had moved to intervene eighteen months after commencement of the case and after the commissioner had fixed the date the hearing was to begin. Validity of the ordinances was of great importance to the taxpaying residents of Quindaro and the city. Due to the one year statute of limitation for filing such actions (G. S. 1959 Supp. 12-502c), the motion to dismiss was an attempt to secure final determination without a hearing on the merits. If permitted the attorney general's action would usurp the judicial power vested in the court and would thereby break down our traditional doctrine of separation of powers by substitution of one man's views for those of a duly-constituted court. The attorney general is without authority to interfere with the county attorney herein, and

in the interest of justice the attorney general's motion should be overruled. Finally, it was claimed the attorney general's action violated sections 1 and 18 of the bill of rights and sections 1 and 2 of article 3 of our state constitution.

Quindaro also filed a motion for permission to maintain the action if the county attorney was held not to be able to do so. Quindaro alleged its readiness, willingness and ability to present the case to the commissioner.

The city filed its motion for judgment on the pleadings as against Quindaro because Quindaro had no legal capacity to sue, no material issue of fact was presented by its answer which admitted the allegations of the petition, and no valid cause of action or defense was stated as to the city.

At the hearing before the commissioner on August 17, 1959, Quindaro filed a motion to stay and substantially stated that on August 10, 1959, the governor had directed the attorney general not to dismiss the proceeding but to prosecute it and assure all parties an opportunity to present the issues to the commissioner and the court; that the attorney general had no authority to continue with his motions and they should be stayed and stricken.

The record discloses that Foster appeared and was present during the hearing of August 17, 1959, at the close of which he made the following statement:

> ". . . I have an interest in the case as County Attorney, I have taken no affirmative action other than I have not objected to Mr. Anderson's motion to supersede me, because I believe that is my duty."

At that time four corporations filed separate applications for leave to intervene as owners of land sought to be annexed. In brief, their principal complaint was that the ordinances had been passed and officially published with-

out notice to them or opportunity to be heard, and if the ordinances were allowed to become effective, the corporations would be subject to city taxes, control and other burdens; and further, if subsequent to the commencement of the action and after eighteen months of waiting, the attorney general were allowed to carry out his purpose, the result would be the taking of each intervenor's property without due process of law in violation of the fourteenth amendment to the federal constitution.

We have not set out the complete contents of the pleadings because they contain facts, contentions and issues necessary to a complete determination of the merits of the case which, as we have already stated, is not presently the issue before us.

The governor and attorney general of our state are constitutional officers under the executive branch of our government, as provided in article 1, section 1 of our Kansas constitution. The terms of G. S. 1949, 75-108 provide:

> "Whenever the governor shall receive notice of the commencement of any action or proceedings, by which the rights, interests or property of the state shall be liable to be affected, he shall inform the attorney general thereof, and require him to act in conjunction with the counsel of the proper party to protect the interests of the state; and in any such case, or in any action prosecuted or defended in behalf of the state, he may, if the public interests require it, employ such counsel as he shall deem proper to assist in any such action or proceeding; and in case of the absence or sickness of the attorney general, or if he shall be in any way interested adversely to the state in any action or proceeding, the governor may employ counsel to act in his stead."

G. S. 1949, 75-702 provides:

> "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested."

In view of the plain, clear and unambiguous language of the first portion of 75-702, it is mandatory upon the attorney general to appear in this court as stated therein and any additional direction from the governor could have no more effect than the legislative mandate. We are not called upon, and we are not now determining whether the attorney general, before appearing "in any other court" would have to be required to do so by the governor, or either branch of the legislature.

It follows that in this court any case in which the attorney general appears involves the public interest. The corollary is likewise true because wherever the public interest is involved or the state is a party, the attorney general is primarily the proper counsel to appear.

Duties of a county attorney are prescribed in G. S. 1949, 19-702, as follows:

> "It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested."

No useful purpose would be served by discussing all the cases where county attorneys have appeared when the

state was a party, or interested, because in no case was his right so to do challenged, considered, or determined, as we are here required to do.

In view of Foster's acknowledgement of service of the attorney general's motion, together with his quoted statement at the hearing of August 17, 1959, to the effect that he was not objecting to the intervention and supersession of the attorney general, and in view of the fact that he sat at the counsel table with the attorney general and conversed with him during oral argument before this court, it appears fair to conclude that Foster was in accord with the manner in which the attorney general was conducting the case. To put it in another way, if Foster had any objection, he should have made it known to the court. On the contrary, he said he was not objecting. The result is he could only have been consenting. By his further action of sitting beside and conversing with the attorney general, instead of with Quindaro's counsel or with some of the numerous other counsel present who apparently were adverse to the attorney general's action, Foster acquiesced in that action. This court in an original proceeding certainly has the right and authority to rely on the appearances and conduct of counsel during the presentation of the matter. By mentioning Foster's attitude, we in nowise desire to create the impression that we are minimizing the power and authority of the attorney general as a real and proper party to appear, prosecute or defend in this court on behalf of the state, as provided in G. S. 1949, 75-702, about quoted, where the rights of the state or the public interest is involved. (Dassler's Kansas Civil Code, Annotated, 2nd ed., Quo Warranto, § 13, p. 818; § 22, p. 823.) Had there been any controversy between Foster and the attorney general, that situation is well discussed in the opinion in *State* v. *Finch*, 128 Kan. 665, 280 Pac. 910, where immunity granted to an informer in a liquor prosecution was within the discretion of the attorney general whose dismissal of the county attorney's

attempted prosecution case of the informer was held to be proper by this court. The Finch case, so far as it applied to the rank of the county attorney and attorney general, was relied on in *State, ex rel.*, v. *State Highway Comm.*, 133 Kan. 357, 299 Pac. 955.

In regard to a contention as to the governor's authority for giving his direction to the attorney general not to dismiss the case but to proceed to final judgment on the merits, we pause to note a few of the cases cited on this point. *State, ex rel.*, v. *Dawson*, 86 Kan. 180, 119 Pac. 360, involved a mandamus action to require prosecution under the prohibitory liquor law by the attorney general and this court therein stated the governor had authority to direct the attorney general to examine a witness when a violation of the liquor law came to his attention. It must be remembered, however, that a prosecution for violation of the prohibitory liquor law would have been brought elsewhere than in the supreme court and also that the prohibitory liquor law conferred more power on the governor than he possesses in other cases in which the state may be involved. (*State* v. *Finch*, supra, p. 667, where the Dawson case, *supra*, was cited.) Our attention is further directed to *Markham* v. *Cornell*, 136 Kan. 884, 18 P. 2nd 158, in which former Governor Harry Woodring, by a long distance telephone call from New York to his private secretary, directed him to send a requisition to the secretary of state requesting a commission for the appointment of Markham as superintendent of public instruction to fill a vacancy caused by death. This attempt by the governor to perform an official act while outside the territorial limits of the state was held to be of no effect, but at the same time his absence from the state did not "constitute his becoming 'incapable of performing the duties of the office' so as to permit the lieutenant governor to assume the powers and duties of the governor." (Syl. ¶¶ 1, 2.)

We cannot agree with the contentions that these cases are determinative of the question now before us. A more recent similar case is *in re Lord*, —— Minn. ——, 97 N.W. 2d 287. There the Minnesota supreme court issued restraining orders in regard to the establishment of daylight saving time. The attorney general by radio and television challenged the supreme court's right to make such an order, and upon the governor's advice, refused to appear before the court to explain or deny his statements. Briefly stated, the Minnesota court held that in preserving the separation of powers of the three branches of government, the governor has no power to clothe the attorney general with immunity from the disciplinary powers of the court when the attorney general appears in court as an attorney; that courts have no jurisdiction over the executive in the performance of executive functions and it is equally vital to our form of government that the executive shall have no power to interfere with the courts in the performance of judicial functions; and finally, that one who is admitted to practice as an attorney at law is an officer of the courts and both by virtue of his oath of office and the customs and traditions of the legal profession, he owes to the courts the highest duty of fidelity. (Syl.)

Applying the above reasoning to our present case we conclude the attorney general by his motion to intervene and supersede the county attorney exercised his powers and duties under the constitution and appropriate statutes; this was as far as he could go as an executive officer and as an attorney and officer of this court. Since he is an officer of the judicial branch, under the separation of powers of the three branches of government, he was limited and restricted in his conduct before this court by the code of professional ethics (164 Kan. xi) to the same extent any other lawyer would be. If, therefore, the attorney general considered the action unmeritorious, he not only had the authority, but he also had a duty to move for dismissal. We cannot think that the framers of our

state constitution or the members of the legislature ever intended that the governor should have control over the judicial branch, or its officers, as is advocated by Quindaro in its brief. Each of the three branches of our government should be zealous of its jurisdiction and each should also be vigilant to see that it does not encroach upon the jurisdiction of the other two.

Any plaintiff has an absolute right to dismiss his action any time before submission (G. S. 1949, 60-3105; *Barnes* v. *Angwin*, 166 Kan. 469, 201 P. 2nd 1057) and in *Kinsch* v. *Missouri-Kansas-Texas Railroad Co.*, 183 Kan. 224, 326 P. 2d 327, when plaintiff moved to dismiss before final submission, this court held the trial court committed reversible error in overruling such motion. We need not burden this opinion with the lengthy discussion of authorities cited on this well-established point.

We now come to the question of Quindaro's status in this proceeding. In *State, ex rel.*, v. *City of Kansas City*, 169 Kan. 702, 719-721, 222 P. 2nd 714, Quindaro, along with four rural high school districts of Wyandotte county, filed briefs *amici curiae* in support of plaintiff's attack on similar annexation ordinances affecting the Fairfax Industrial district because of the resulting loss of taxes to Quindaro and the school districts. This court substantially there stated that the legislature has the authority to create municipal corporations, to modify their boundaries by increasing or decreasing them, or to disorganize such municipalities. To the same effect is *State, ex rel.*, v. *School District*, 163 Kan. 650, 654, 185 P. 2d 677, wherein *State, ex rel.*, v. *French*, 111 Kan. 820, 208 Pac. 664, and *School District* v. *Board of Education*, 110 Kan. 613, 204 Pac. 758, were cited as authority for the proposition that school districts, like many other municipalities, are creatures of the legislature and are subject not only to its power to create, but also to its power to modify or dissolve. Such school districts therefore have no vested

rights in their existence and are subject to the legislature's power to extend or limit their boundaries, consolidate two or more under one, or abolish one or more of them altogether.

The most favorable interpretation to be made of the pleadings of Quindaro and the intervenors indicates they are attacking the city's attempt to extend its corporate limits to include new territory, which is a reorganization of the city that in turn involves its corporate validity. Such an attack can only be made by the state. The landmark case of *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2nd 101, 13 ALR 2d 1272, makes this point crystal clear and includes a thorough discussion of many of the leading cases cited by the parties to this appeal. See, also, *Lampe* v. *City of Leawood*, 170 Kan. 251, 253, 254, 225 P. 2nd 73.

In *City of Blackwell* v. *City of Newkirk et al.*, 31 Okla. 304, 121 Pac. 260, the conclusion of the Oklahoma supreme court likewise was that only the state may question extensions of city limits and, as shown in the opinion (p. 329), this conclusion was based at least in part on decisions of our Kansas court.

There appears to have been no violation of article 4, section 4 of the federal constitution or of the fourteenth amendment. These questions were fully discussed and decided in *Kies* v. *Lowrey*, 199 U.S. 233, 239, 240, 26 Sup. Ct. 27, 50 L. ed 167, and we shall not repeat them in detail except to say that a state legislature has absolute power to make and change subordinate municipalities such as counties, towns and school districts because they are auxiliaries of the state. In *Hunter* v. *Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L. ed 151, the city of Pittsburgh, Pennsylvania, undertook to annex the city of Allegheny even though the latter, a much smaller city, had voted by majority vote against the annexation. Hunter, along with three other residents who were citizens, voters, taxpayers, and owners of real and personal property in

Allegheny, filed exceptions to the petition of Pittsburgh, and Pittsburgh answered the exceptions. Allegheny was allowed to intervene with the four citizens but made no changes in the record. The exceptions of the four citizens to the petition there alleged were more far-reaching than the contentions set out by Quindaro here, but the same rules, in substance, were applied in affirming the disallowance of the exceptions of the four citizens, joined in by the city of Allegheny as intervenor.

We conclude the findings of fact made by our commissioner which are substantially set out herein are correct and they are approved. However, in view of the many authorities cited by the parties, all of which have been considered though only a few have been mentioned herein, we find ourselves unable to agree with the commissioner's recommended conclusions of law except that part where he denied the petitioning corporations leave to intervene by reason of their not being proper parties, as shown in *Smith* v. *City of Emporia*, supra. We further conclude the attorney general was entitled to intervene for the reasons that (1) Foster, as county attorney, lodged no objections to the action of the attorney general and, in fact, he appeared to cooperate with him; and (2) following the applicable rules of law, the attorney general is superior to a county attorney in appearances before this court in original cases involving the state, or the public interest. Once the attorney general in his executive capacity appears in this court, he has the duty as an officer of this court, to limit his conduct as prescribed by the code of professional ethics; the governor, although the head of the executive branch of our state government, cannot control the authority and power of the officers of this court, which heads up the judicial branch of our state government. As previously stated, the attorney general, plaintiff herein, had an absolute right to dismiss this action and the allegations in Quindaro's pleadings must fall because they clearly show that Quindaro, one

municipality, is questioning the organization, or reorganization, of the city, another municipality, and this can be done only by the state through its proper officers.

Other contentions of the parties need not be determined.

The ultimate result is we hereby terminate this particular proceeding by ordering that the case be dismissed.

It is so ordered.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 41072

STATE OF KANSAS, ex rel., Robert J. Foster, County Attorney of Wyandotte County, Kansas, *Plaintiff*

vs.

THE CITY OF KANSAS CITY, KANSAS, a municipal corporation; Paul F. Mitchum, Mayor Commissioner; Earl B. Swarner, Commissioner of Finance, Health and Public Property; Joseph P. Regan, Commissioner of Boulevards, Parks and Streets; and Quindaro Township, Wyandotte County, Kansas, a body politic and corporate, *Defendants*

AMENDED REPORT, RECOMMENDATIONS AND CONCLUSIONS OF LAW

STATEMENT OF STATUS OF PROCEEDINGS

1. The above-entitled action was filed as an original action in the Supreme Court of the State of Kansas on January 8, 1958, by Donald E. Martin, who was the duly

qualified and acting County Attorney of Wyandotte County, Kansas. An amended and supplemental petition was thereafter filed in said proceeding by Donald E. Martin on August 7, 1958. In the amended and supplemental petition it is alleged that after the filing of the original petition and on January 28, 1958, the defendant City of Kansas City, Kansas attempted to enact Ordinance No. 41427, and on March 25, 1958, attempted to enact Ordinance No. 41525, and on April 15, 1958, attempted to enact Ordinance No. 41557, and on June 24, 1958, attempted to enact Ordinance No. 41659, and on July 22, 1958, attempted to enact Ordinance No. 41700; all of the ordinances so numbered are alleged to be void, and not authorized by the Legislature of Kansas, and are also alleged to be ordinances attempting to annex land lying within the area attempted to be described in Ordinance No. 41258, attempted to be enacted on December 10, 1957, alleged to be void as beyond the City's power by both the original, and the amended and supplemental petitions.

2. Thereafter the defendant Quindaro Township on October 8, 1958, filed its answer in which all of the ordinances described in the amended and supplemental petition were alleged to be void, and in which affirmative relief by way of injunctive relief in aid of judgments previously entered was prayed, and the defendants except Quindaro Township filed on October 28, 1958, an answer to the answer of Quindaro Township and said defendants filed an answer to the amended and supplemental petition, on October 28, 1958.

3. Thereafter and on November 13, 1958, the plaintiff by Donald E. Martin filed its reply.

4. Thereafter and on the 18th day of November, 1958, the plaintiff by Donald E. Martin filed a motion for the appointment of a commissioner. This motion was resisted by the defendant The City of Kansas City, Kansas, on the ground that the facts could be stipulated. The motion was

sustained by the Court on the 28th day of November, 1958, with the proviso that a Commissioner would be appointed on February 2, 1959, if the parties had not theretofore agreed on a stipulation of facts. Thereafter, and on application of the parties, the matter of appointing a Commissioner was continued from time to time until a renewed application was filed on April 22, 1959 by the plaintiff for the appointment of a Commissioner, the Commissioner being appointed on the 30th day of June, 1959.

5. The Commissioner held a conference with attorneys representing all parties to the action on July 21, 1959.

6. On July 22, 1959, the Attorney General filed in the cause his motion to supersede, strike from the files, and to dismiss. Also on the 22nd of July, 1959, the defendant Township filed its objection to the Attorney General's motion to intervene, its objection to the Attorney General's motion to dismiss, and its motion to permit it to maintain the action.

7. On the 31st day of July, 1959, the defendants except the defendant Quindaro Township filed a motion for judgment on the pleadings as against the defendant Quindaro Township.

8. On the 10th day of August, 1959, the Governor of the State of Kansas caused to be given to the Attorney General of the State of Kansas the following direction:

> "I understand you have filed motions to intervene and to dismiss Case No. 41,072 (the Fairfax Annexation case) which is pending in the Supreme Court of Kansas.
>
> "It is not my intention to take sides in this case, but since it has been set for hearing August 12, 1959, it is my opinion there should be a final judicial determination of the matter.
>
> "It is not proper to deprive parties of their day in court.

"Therefore, I require, under Sec. 75-702, G. S. 1949, that you do not dismiss this proceeding and that you proceed to prosecute it and assure all parties an opportunity to present the issues to the commissioner and to the court."

SUGGESTED CONCLUSIONS OF LAW

Hearing was had in Kansas City, Kansas, on Monday, August 17, 1959, on all motions pending at that time.

Since the above hearing applications for leave to intervene have been filed by Phillips Petroleum Company, Union Pacific Railroad Company, Girten Investment Company and Sealright-Oswego Falls Corporation. The various motions filed herein were taken up and considered in the following order:

1.

MOTION OF QUINDARO TOWNSHIP TO STAY AND STRIKE PROCEEDINGS BY THE ATTORNEY GENERAL IN CONNECTION WITH THE ATTORNEY GENERAL'S MOTION TO DISMISS AND THE ATTORNEY GENERAL'S OBJECTION TO THE PLEADINGS FILED BY QUINDARO TOWNSHIP

At the opening of the proceedings, the motion was filed by Quindaro Township setting out a copy of a letter by the Governor of the state, addressed to the Attorney General, inviting his attention to proceedings to be had in this case, the letter concluding that

> "Therefore, I require under Section 75-702 G. S. Kansas 1949, that you do not dismiss this proceedings and that you proceed to prosecute it and assure all parties an opportunity to present the issues to the Commissioner and to the Court."

The Attorney General, in open court, acknowledged receipt of this letter and stated in effect that he intended to dis-

regard it, and that he would proceed and urge his motion to supersede the County Attorney and insist upon a dismissal of this case.

It is the conclusion of the Commissioner that the Governor of the state does have authority to direct the Attorney General in some respects and that in this case he was acting within the scope of this authority. That the Attorney General having refused to comply with the direction of the Governor might be compelled to do so by an appropriate proceeding instituted by the Governor. However, it is the opinion of the Commissioner that 7-107 G.S. Kansas, 1949, does not apply in this case; that this section of the statute is intended to give a litigant authority to inquire as to the right of an attorney claiming to represent another party litigant where such authority is not disclosed by the record in the case.

In this case, the Attorney General, by reason of his office, is authorized to represent the State of Kansas. The question of whether or not he is properly representing the state or acting in defiance of a direction of the Governor is not within the scope of the inquiry authorized in Section 7-107 G.S. Kansas 1949.

The above finding that the motion of Quindaro Township contained a copy of a letter from the Governor to the Attorney General is based upon the record at the time of the hearing August 17, 1959. The application of Quindaro Township was verified and the correctness of the statements therein contained were not challenged by affidavit or any type of denial. However, on the hearing on objections the parties might have to the proposed report, the Attorney General's office raised the question of the truth and propriety of this finding and, as the record of the hearing on September 21, 1959, will disclose, verifax copies were introduced which disclose a difference in that the township's motion did not state the point of origin of the telegram or the letter, which was Miami, Florida. These

were all allowed to go into the record and the Attorney General's office relied heavily on Markham vs. Cornell, 136 Kansas 884 in support of the Attorney General's contention that the Governor had no authority to give any orders outside the state of Kansas. It was stated into the record that the Governor was outside the state returning from a Governors Conference and, hence, it would appear that he was on official business. That being the case, Markham vs. Cornell does not support the Attorney General's position or require any change in the conclusion of law hereinabove set out.

2.

MOTION OF THE ATTORNEY GENERAL TO SUPERSEDE, STRIKE FROM THE FILES AND DISMISS, AND OBJECTION OF QUINDARO TOWNSHIP TO THE ATTORNEY GENERAL'S MOTION.

The files in this case disclose that the original petition was filed January 8, 1958. The supplemental petition filed herein discloses that the last ordinance that is being attacked became effective July 22, 1958. The files further disclose that this action was brought and the supplemental and amended petition was filed by the then County Attorney of Wyandotte County, Kansas, Donald E. Martin, whose office expired in January of 1959; that Robert J. Foster, his successor in office, was substituted for Donald E. Martin. That John Anderson, Jr., was at the time this suit was filed the Attorney General of this state and has been in that office at all times since then and is now the Attorney General. That on July 22, 1959, he made his first appearance in this case by motion to supersede the County Attorney and to dismiss the suit.

That under the law of this state a city ordinance can be challenged only by some proceedings commenced within one year after the ordinance became effective. That if the Attorney General is allowed to dismiss this proceedings,

the ordinances attacked in the proceedings brought by the County Attorney will remain effective for the legality of and adoption [sic] cannot be challenged in a suit commenced after July 22, 1959.

It is the conclusion of the commissioner that the parties affected by the adoption of these ordinances had a right to have the legality of the adoption of the ordinances in question inquired into in a quo warranto proceedings. That such inquiry should have been initiated by the Attorney General or County Attorney of Wyandotte County. That had request for the initiation of such a proceeding been made and refused by both the Attorney General and County Attorney, mandamus proceedings against them should have been entertained. This right, however, terminated July 22, 1959. In view of the fact this suit had been commenced and was during all that time properly prosecuted, no action could have been taken by the parties directly interested. That the Attorney General having sat idly by until the time in which the parties directly affected could bring any action to require the prosecution of this suit had expired, he cannot now supersede the County Attorney when his avowed purpose in asking to supersede the County Attorney is to dismiss this case and prevent a hearing on the merits.

Section 75-702 of the General Statutes of Kansas for 1949 imposes on the Attorney General the duty to "prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the State shall be interested or a party." The statute does not empower the Attorney General to appear in a proceedings in which the public is interested and dismiss the proceedings and thereby defeat the interest of the public.

That if it should be determined that he has a right to supersede the County Attorney he does not have the right to dismiss these proceedings unless all parties hereto consent thereto. Quindaro Township was made a party de-

fendant. The original petition and the supplemental and amended petition stated Quindaro Township had or claimed an interest in this litigation. In the prayer it was asked that they be required to set up what interest, if any, they did have in this litigation. The township has answered and joined in plaintiff's request that these ordinances be vacated and set aside. The township has filed objections to the Attorney General superseding the County Attorney or dismissing this case.

It is the conclusion of the Commissioner that the objections of Quindaro Township are valid and should be sustained. That the Attorney General should not be allowed to supersede the County Attorney at this late date or dismiss this case.

3.

MOTION TO PERMIT QUINDARO TOWNSHIP TO MAINTAIN THE ABOVE ENTITLED ACTION.

The township has filed a motion seeking authority to maintain this action to determine the validity of the ordinances involved as set out in plaintiff's petition, in the event it should be held that the above entitled action should not be prosecuted by the County Attorney of Wyandotte County, Kansas.

It is the conclusion of the Commissioner that Quindaro Township, having been made a party to this action and having, pursuant to the request of the plaintiff, set up its interest herein, and further in view of the fact that the County Attorney had stated in a preliminary conference called by the Commissioner and had July 21, 1959, that a Mr. Leonard Thomas, attorney for Quindaro Township, would carry the burden for both the county and the township in view of the County Attorney's lack of familiarity with this case; that regardless of whether or not the County Attorney or the Attorney General continue to prosecute this case, Quindaro Township should be allowed to maintain this action to final conclusion.

4.

MOTION OF THE CITY OF KANSAS CITY FOR JUDGMENT ON THE PLEADINGS AS AGAINST THE DEFENDANT QUINDARO TOWNSHIP.

It is the conclusion of the Commissioner that Quindaro Township, having been made a party defendant by the plaintiff and having joined in the request of the plaintiff and having sought the same relief sought by the plaintiff, it does have legal capacity to prosecute this case to a final conclusion. That the city is not entitled to a judgment on the pleadings and the motion of the city should be denied.

5.

MOTIONS OF PHILLIPS PETROLEUM COMPANY, SEALRIGHT-OSWEGO FALLS CORPORATION, GIRTEN INVESTMENT COMPANY AND UNION PACIFIC RAILROAD COMPANY FOR LEAVE TO INTERVENE.

These corporations all filed motions for leave to intervene stating that they each owned substantial property in the area included in the ordinances involved herein and that they would suffer substantial injuries if the ordinances were not set aside. In the applications it was set out that the attorney general was seeking to dismiss the proceedings and that if the proceedings were dismissed the ordinances would be effective and they would have no recourse.

It is the conclusion of the Commissioner that if the Attorney General should be allowed to supersede the County Attorney and Quindaro Township was not allowed to maintain the above entitled action, or if no one opposed their intervention, they should be allowed to intervene. However, since it is the conclusion of the Commissioner that the Attorney General is not authorized to supersede the County Attorney at this stage of the proceedings, and if the Attorney General is permitted to supersede the County Attorney, even then Quindaro Township is au-

thorized to maintain this proceedings and since the city is opposing the Intervention, these corporations' applications for leave to intervene should be denied. They, of course, no doubt would be given leave to file briefs amicus curiae when the time comes for the Supreme Court to pass upon these conclusions of law or any later recommendations that might be made by this Commissioner. There are, no doubt, many other corporations and individuals whose interests are similar to those of these four corporations, and if these petitioners were allowed to intervene there would be no reason for denying that right to all other parties having property within this tract of 196 acres.

Respectfully submitted,

/s/ JAY W. SCOVEL
Commissioner

FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 909

GIRTEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, SEALRIGHT-OSWEGO FALLS CORPORATION, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN ANDERSON, JR.,
Attorney General,
State of Kansas.

CHARLES C. W. BRENNEISEN,
City Attorney,
City of Kansas City, Kansas.

JOSEPH T. CAREY,
Deputy City Attorney,
City of Kansas City, Kansas.

JOHN WILLIAM MAHONEY,
Special City Attorney,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 909

GIRTEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, SEALRIGHT-OSWEGO FALLS CORPORATION, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The facts are largely set out in the opinion of the Kansas Supreme Court, 186 Kansas 190, which is printed as Appendix A to the petition for the writ.

The Fairfax Industrial District is an area of approximately 2500 acres which lies north and east of Kansas City, Kansas, completely surrounded by the

city boundaries and the Missouri River. For years the city has extended benefits to the area including water, light, power and other municipal services. The district is an urban area, with substantial economic and sociological ties to Kansas City.[1]

In early 1958, Kansas City, acting under authority of Kansas General Statutes 13-1602, 1949, and in keeping with the Kansas Supreme Court's interpretation thereof, enacted Ordinance 41525,[2] which annexed approximately 190 acres of the area including property owned by the petitioners.

In Kansas the rule is well settled that any attack on an annexation ordinance, since it involves the corporate existence of a municipal corporation, may be brought only by the state in a *quo warranto* proceeding on relation of the attorney general or, under him, the county attorney.[3] In 1958 the county attorney commenced a

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[1] *State ex rel Martin* v. *City of Kansas City*, 181 Kan. 870, 872.

[2] Adopted March 25, 1958. The cited statute confers several grants of authority on the city to achieve annexation. Under one branch of authority, the city may annex any amount of unplatted land which "lies within (or mainly within) any city." Pursuant to the interpretation of this phrase by the Kansas Supreme Court, *State ex rel Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P. 2d 806 (1957), requiring a common perimeter with the city boundary of more than 50% of the total perimeter of the annexed area, Kansas City adopted Ordinance No. 41525. The approximately 190 acres annexed had an entire perimeter of 11,222.16 ft., of which 5,732.54 ft., or more than 50%, comprised a common boundary with the City at the time of annexation. The Kansas Supreme Court had recognized the area as unplatted land, *ibid*, 181 Kan. 870, 875.

[3] *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 101 (1949) which collects the cases and sums up that "the rule, founded on public policy . . . has been the settled law of this state for more than half a century . . . ." Recently the Kansas legislature re-

quo warranto proceeding on behalf of the state to test Ordinance No. 41525, and others which are of no importance here.[4]

The defendants were Kansas City and Quindaro Township, which formerly had jurisdiction over the annexed tract. Following pleadings by the parties, the Kansas Supreme Court appointed a Commissioner on June 30, 1959, to hear evidence and recommend findings. In July, the State's Attorney General came into the case. Having reached the view that the statutory annexation conditions had been met, that the common perimeter of the city and tract boundary was more than 50% of the total tract boundary, that there were not

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affirmed the rule in enacting G.S. 12-502c (1957) which placed a one year limitation on the bringing of such actions. The underlying statute authorizing *quo warranto* is G.S. 60-1603.

[4] Ordinance No. 41525, briefly described in footnote 2 above, and set out in full at page 33 of the Transcript of the Record, is the only ordinance directly involved in this case, notwithstanding mention by petitioners of six ordinances (Petition, p. 4). Ordinance No. 41358 of December 10, 1957, was repealed by No. 41525, thus eliminating a dispute over the description of the boundaries of the annexed area and slightly reducing its size; and passage of No. 41427, which covered a small portion of the tract in the repealed ordinance, was abandoned after its first reading of January 14, 1958. Hence the meaning of the city's "admission" in the pleadings respecting these two repealed and abandoned ordinances was obviously not "invalidity" as claimed by petitioners (Petition, pp. 4, 14, n. 4), but "nonexistent" and therefore not relied upon for validity of the annexation. Ordinances No. 41557 of April 15, 1958, No. 41659 of June 24, 1958, and No. 41700 of July 22, 1958, each involved a small portion of less than 20 acres of the tract covered by No. 41525 and were adopted under a second branch of the statutory authority (GS 13-1602) authorizing annexation of less than 20 acre tracts. These were adopted out of an abundance of caution and were not and are not necessary for the support of the annexation made in this case.

sufficient grounds for maintenance of the action, and that in view of the expense incurred in previous cases prosecution in this case amounted to an harassment of the city, he concluded that it would be in the public interest to terminate and dismiss the present action.[5] On July 22, 1959, the Attorney General moved to intervene and supersede the county attorney, to remove Quindaro Township from the case as having no justiciable interest, and to dismiss the action.

At a hearing before the Commissioner, in August, 1959, the county attorney affirmed his acquiescence in being superseded. The Township asked for a stay against the Attorney General. The four private corporations, who are the petitioners here, asked for leave to intervene and to maintain the action themselves as relators for the state alleging that otherwise their property would be subjected to municipal taxes levied, and to municipal burdens imposed, by Kansas City with no opportunity to have the issue of whether the annexation is void determined by the court.[6]

The Commissioner's conclusions were that the Attorney General could not supersede the county attorney and dismiss the case, that Quindaro Township could maintain the action to a final conclusion, and were it not for these conclusions the four corporations might be allowed to intervene and maintain the action.[7]

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[5] Supplemental Transcript of Record, Reply of Attorney General to Quindaro Township Motion for Rehearing, page 8; 186 Kan. 190, 192, Petition, p. 3a.

[6] See, as an example of the four petitions, the petition of Phillips Petroleum Company, Transcript of Record pp. 96-97; 186 Kan. 190, 194, Petition, pp. 5a-6a.

[7] Petition, Appendix B.

The Kansas Supreme Court, in its unanimous opinion of March 5, 1960,[8] disagreed with these conclusions. The Court held that the Attorney General could, as a matter of law, and did, and in fact, supersede the county attorney; and "If, therefore, the Attorney General considered the action unmeritorious, he not only had the authority, but he also had a duty to move for dismissal."[9] The Court further held that neither Quindaro Township nor the individual interveners had any status to question the city's annexation of new territory "which is a reorganization of the city that in turn involved its corporate validity. Such an attack can only be made by the state."[10] The Court terminated the proceedings by ordering the case dismissed.[11]

ARGUMENT

I

THE ISSUE

Petitioners, without asserting in their petition to this Court that the annexation or ordinance upon which it rests is invalid,[12] claim that as a matter of law they

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[8] 186 Kan. 190, Petition, Appendix A.

[9] 186 Kan. 190, 197; Petition, p. 10a.

[10] Citing the Kansas cases and those of other jurisdictions, 186 Kan. 190, 198; Petition, p. 12a.

[11] 186 Kan. 190, 199; Petition, page 14a.

[12] In their petitions to intervene in the proceedings below before the Kansas Supreme Court Commissioner, petitioners adopted the reasons set out in the amended and supplementary petition in *quo warranto* as their reasons for claimed invalidity of the annexation. See e.g. Transcript of Record, p. 93. Most of these dealt with the five ordinances which, as set out in n. 4, supra, were not relied upon and were either repealed, abandoned, or surplus to No. 41525.

are entitled in their own right to challenge the legality of the ordinance, and that the denial of their alleged right of challenge in a court is a denial of due process and equal protection under the Fourteenth Amendment.[13] The deprivation under the Fourteenth Amendment is envisaged as follows:

> "If petitioners are not now permitted to secure a judicial determination as to the legality of the ordinances they will be wholly without a remedy when the City of Kansas City takes their property by taxation, although that taking is unlawful unless the ordinances of annexation are valid."[14]

Petitioners concede that the state legislature could have directly accomplished the annexation in the same language as the ordinance, without any right to a hearing.[15] They so concede because such legislative action (changing the boundary of a political subdivision and annexing land under the jurisdiction of one to the jurisdiction of another) resulting in the subjection of the annexed property to taxation or to increased taxation by a new or different political subdivision, even without consent and over the opposition of the property owner, is lawful and consistent with due process of law.[16]

Petitioners further concede that the state legislature may properly delegate the annexation function to a

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[13] Petition, p. 7.

[14] Petition, p. 8.

[15] Petition, p. 9.

[16] Petition, p. 9; *Hunter* v. *Pittsburgh*, 207 U.S. 161.

political subdivision such as Kansas City,[17] and that if the delegated function is properly exercised by the political subdivision, the annexation is lawful. As they succinctly put it, "If the ordinances are valid petitioners have no basis for complaint."[18]

Thus the question narrows down to whether the exercise by a municipality of the legislative function of annexation is subject to challenge in a court and, if so, by whom. To this petitioners would add, if the right of challenge is denied by a state to a private landowner in the tract affected, does this comport with due process and equal protection of the laws?

II

Reasons for Denying the Writ

A. Petitioners Have No Standing To Sue Or To Prosecute This Appeal

In Kansas, as in many states, the rule is settled that an attack on an annexation ordinance may be made in a *quo warranto* action against the annexing municipality but brought only by the state in the discretion of its proper officers.[19] The latter include the State Attorney

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[17] Delegation of legislative power to municipalities is a well established, time honored exception to the general rule against delegation of legislative powers. *New Orleans Waterworks* v. *New Orleans*, 164 U.S. 471, 481; *Brodbine* v. *Revere*, 182 Mass. 598, 66 N.E. 607 (1903). Included in this exception is the delegation to cities of the annexing power. 64 ALR 1379 et seq.

[18] Petition, p. 8.

[19] *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 101 (1949), *Lampe* v. *City of Leawood*, 170 Kan. 251, 225 P. 2d 73 (1950). An array of like authorities in other states is collected in 13 ALR 2d 1279.

General and the county attorney, but a county attorney may be superseded by the State Attorney General, as occurred in this case.[20]

The reason for limiting the action to state officials is one of sound public policy. An attack on an annexation ordinance throws the corporate existence of a municipal corporation into question, and to permit any and all disgruntled individuals to launch such attacks, whether frivolous or not, would lead to uncertainty and interminable confusion in city affairs and result in a breakdown of municipal government.[21]

Thus, in Kansas, an individual property owner and taxpayer [22] has no standing to sue in an action to ques-

[20] 186 Ka. 190, Petition, Appendix A; *State* v. *Finch*, 128 Kan. 665, 280 P. 910 (1929).

[21] Only the state acting in direct proceedings can challenge the validity of a municipal corporation. *Shapleigh* v. *San Angelo*, 167 U.S. 646, 655-656; *Tulare Irrigation District* v. *Shepard*, 185 U.S. 1, 14.

The Kansas Court, in denying the existence of any private rights in the status quo of the political subdivision and therefore denying any right of private attack on an annexation directly (*Smith* v. *City of Emporia*, *supra*) or collaterally (*Topeka* v. *Dwyer*, 70 Kan. 244, 78 P. 417 (1904)), have stated that the consequences to society of allowing a private attack upon the existence of cities would be intolerable, and hence courts are concerned "not if there exists a valid law, but if considerations of the public welfare shall forbid any inquiry as to whether or not there is a valid law, not if constitutional limitations have been transgressed, but if the public tranquility and the effective administration of government require that the matter of validity, or invalidity, shall be ignored, and a situation of affairs be arbitrarily recognized as if it were legal, whether in fact it be so or not." 70 Kan. 244, 249. See also *Gardner* v. *Benn*, 81 Kan. 442, 105 P. 435 (1909).

[22] This limitation on the right of individual to question legislative action in judicial proceedings where standing is predicated on the status of taxpayer is recognized elsewhere. *Massachusetts* v. *Mellon*, 262 U.S. 447.

tion an annexation ordinance, either directly or collaterally.[23] Petitioners in effect are asking this court to overturn decisions and policy carefully evolved by the courts and legislature of Kansas in order to improvise for petitioners an individual judicial remedy in place of the established representative remedy (combining legislative, administrative, and judicial aspects, summarized under heading B, below), simply because they have disagreed with the representative of the state, the Attorney General of Kansas, on the desirability of resorting to judicial review.

The request is analogous to urging that because the public prosecutor decided not to seek an indictment, or has moved to dismiss an indictment brought, members of the public, particularly those claiming to have been wronged by the defendant, may step in and prosecute.

A difference of view on how litigation should be handled or turn out, does not give rise to standing where the dissident had no standing to begin with. The petitioners would have this Court create individual standing to sue not only where none existed, but where, historically and for good and sound policy reasons, individual standing has been deliberately withheld in favor of the standing of the legal officers of the state, clothed with discretion to sue upon an exercise of their best judgment. The suggested improvisation, we submit, is beyond the scope of action by this Court.

B. There Is No Substantial Federal Question To Be Determined

Petitioners urge the improvisation of this individual right to challenge the annexation ordinance because without it, they contend, they are denied due

[23] Cases and statute cited in notes 3, 19, and 21 supra.

process and equal protection under the Fourteenth Amendment.

This Court has held repeatedly that the state may expand or contract the territorial area of municipal corporations with or without the consent of the citizens or even against their protest, and that it may do so "unrestrained by any provision of the Constitution of the United States."[24] Specifically, this court has rejected the contention that the Fourteenth Amendment was violated by such state action.[25] Petitioners do not deny, in fact they concede, this proposition;[26] but argue that the Fourteenth Amendment violation takes place when they as individual property owners are not permitted to obtain the judgment of a court that Kansas City did or did not properly exercise the annexation powers of the state which were delegated to it.[27]

But if, as here, in delegating annexation powers to Kansas City (and other cities) the state has reserved for itself alone, through the Attorney General,[28] the right to question the manner of the delegate city doing what the state itself could do unhampered by the Fourteenth Amendment, it becomes difficult to perceive any right of an individual which has been taken without due process of law if the state chooses not to question the exercise of the powers. Likewise, it is difficult to understand how any one individual in the state has been deprived of equal protection of the laws when the laws,

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[24] *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179; *Kelly* v. *Pittsburgh*, 104 U.S. 78; and see other cases cited at 207 U.S. 178.

[25] Ibid.

[26] Petition, p. 9.

[27] Petition, pp. 9-10.

[28] The supremacy of the Attorney General over the county attorney was settled by the Kansas courts.

with propriety, have conferred on no individual the right to challenge, but have reserved that right to the state acting through designated officials.[29]

Boiled down, the petitioners' argument is that before their property is transferred from one taxing jurisdiction to another, and subjected to the current taxation of the annexing city, it is their right to have the annexing ordinance tested by the courts and for the courts to say that the ordinance is valid or not, irrespective of the views of the officials of the state to whom the primary decision has been entrusted. This is merely rearguing *Hunter* v. *Pittsburgh* which in recognizing the plenary power of the state to expand or contract the territorial area of its municipal corporations or other political subdivisions, held:

> "All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or other-

[29] What petitioners are arguing is that because the state has brought the testing action in some cases, failure to bring or continue it here is a denial of "equal protection". (Petition, pp. 11-13.) The logic of such a view would make mandatory the testing by the state of every annexation, a result clearly not contemplated under the law nor required by any provision of the state or federal constitutions.

wise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." [30]

Petitioners' argument that they are entitled, as of right, to a court test of the annexation ordinance before their property is transferred to the new taxing jurisdiction, ignores the holdings of this Court that process, other than a judicial determination, is due process of law in the consummation of political boundary line changes and the imposition of tax burdens.[31] Under Kansas law a city may annex territory, pursuant to certain standards prescribed by general statutes, and after notice to county officials and two public meetings, which affords opportunity, in the first instance, for persons concerned to be heard and to support or oppose the proposal, if they desire, before the governing body of the city.[32] Thereafter, if the annexation is consummated, the law reposes in the State Attorney General, or under him the county attorney, authority to administratively determine that the city has complied with the requirements of law. That official is open to persuasion by private persons that the municipal action was proper or improper, but the judgment is

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[30] 207 U.S. 161, 179.

[31] *Kelly* v. *Pittsburgh*, 104 U.S. 78; *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 707-710; *Davidson* v. *New Orleans*, 96 U.S. 97; *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112.

[32] Kansas G.S. 13-1601, 1602; 13-2901, 13-2902, as revised L. 1959 ch. 64.

his.[33] If, in his judgment, there has been no failure of compliance, that is the end of the matter. If the Attorney General, or under him the county attorney, is of the view that the action taken was or may have been in violation of law, he may, on behalf of the state, within one year, bring an action in *quo warranto* and obtain a judicial decision.[34] Thus, there is a complete pattern of legislative and administrative process, coupled with discretionary resort to judicial review if review is warranted in the judgment of the public officers in charge.

The exclusion of private citizens from the judgment that judicial review is needed, or from prosecution of the appeal of the public question, is not a denial of, nor is it inconsistent with, due process of law or equal protection of the laws.

Petitioners have not alleged, and cannot in truth point to any special or peculiar injury to their property or personal rights which would call for deviation from the pattern of procedure provided by Kansas in this case. They have merely assumed throughout their argument (Petition, pp 8, 9, 10) that subjection of their property to nondiscriminatory reasonable taxation by Kansas City (in place of Quindaro Township) is an injury and sufficient injury which calls for federal

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[33] In fact, in this case, the county attorney was prevailed upon to challenge the city's action, but later acquiesced in the Attorney General's view when the latter reached a different conclusion and requested and obtained dismissal of the challenge, 186. Kan. 190, 195; Petition, p. 8a. The petitioners addressed letters to the Attorney General which outlined their position, so that he might exercise his discretion on whether or not to attack the ordinance on behalf of the state. See, for example, the letter of the Phillips Petroleum Corp., Transcript of Record, pages 98-99, which was typical of the letters sent by each of the petitioners.

[34] Kansas G.S. 12-502c.

intervention. This is contrary to the rulings of this Court,[35] and petitioners' request for federal intervention goes beyond the settled limitations of federal jurisdiction in this regard.[36]

Conclusion

It is respectfully urged that the petitioners are without standing to sue in this proceeding or before this Court, and that in any event their petition raises no substantial federal question which would entitle them to invoke the jurisdiction of the Court.

Respondents respectfully move that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas be denied.

Respectfully submitted,

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Attorney General,
State of Kansas.

Charles C. W. Brenneisen,
City Attorney,
City of Kansas City, Kansas.

Joseph T. Carey,
Deputy City Attorney,
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Attorneys for Respondents.

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[35] Cases cited, notes 24 and 31, *supra*.

[36] Any imputed support for petitioners' position in the reference (Petition, p. 9 n 2) to the grant of certiorari in *Gomillion* v. *Lightfoot* is inapropos. In that case the charge is made that the state legislature misused its powers in fixing municipal boundaries as a device to cut off voting rights of a group of its Negro citizens.

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IN THE

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GIRTEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, AND SEALRIGHT-OSWEGO FALLS CORPORATION,
Petitioners,

vs.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General, THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate, *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GEORGE DOCKING AS GOVERNOR OF KANSAS.

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable and Chief Justice and the Associate Justices of the United States:

George Docking, Governor of Kansas, respectfully moves this Court, pursuant to Rule 42 of the Rules of this Court, for leave to file the accompanying brief *amicus curiae* in support of the petition for certiorari.

The questions of law as to which review is sought raise issues which transcend the particular interests of the parties to the litigation. The interest of the movant as chief Executive of the State of Kansas in these issues and his reasons for seeking an opporunity to acquaint the Court with his views are set forth in detail in the attached brief.

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Attorneys for George Docking, Governor of Kansas.

IN THE

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BRIEF AMICUS CURIAE OF GEORGE DOCKING AS GOVERNOR OF KANSAS.

The question presented in this case is whether, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, property may be taxed and regulated without giving its owner any right whatsoever to a hearing on his contention that the taxation and regulation are illegal because they are not imposed by lawful authority.

Because of the fundamental principle which is involved, the State of Kansas has a direct and substantial interest in this question which transcends the particular interests of the parties to the litigation.

The Legislature of Kansas has delegated to municipal corporations a limited power which permits them on certain specified conditions to annex adjoining territory. The exercise of this power in any given situation directly affects property in the annexed territory by subjecting it to municipal taxes and municipal regulation. If the power of annexation is exercised in accordance with the conditions laid down by the Legislature of Kansas the property owners affected have no basis for complaint. But if the attempted annexation is not in compliance with the directions of the Legislature then the municipal corporation attempting the annexation has no more right to tax and to regulate the property affected than would a private corporation.

It is inconsistent with fundamental American conceptions of justice and fair play for a property owner to be denied the right to a fair hearing on his contention that an attempted annexation is unlawful because not in compliance with the directions of the Legislature. Yet that is the effect of the decision below. That decision holds that the property owner is not himself entitled to a hearing, and permits the Attorney General of the State to decide, in his sole discretion, whether any court may ever review the citizen's contention that his rights are threatened by unlawful action. Thus, under the decision, the right to a hearing before an impartial tribunal, which is an essential element of the concept of Due Process, is not protected by any rule of law which gives equal protection to all similarly situated but is made contingent upon the *ex parte* decision of a single executive officer.

The undersigned takes no position on the question whether the attempted annexation that has given rise to this litigation is valid or invalid under the laws of Kansas. That question is not here presented. The essential point is that the question is judicial in character and should be decided after a full hearing on the merits and not finally foreclosed by the determination of an executive officer of the State government.

The guarantees of due process and of equal protection embodied in the Fourteenth Amendment rest on a conception of justice which is essential to a free government. In the long run no State government will benefit if those guarantees are sacrificed for some immediate advantage. The true interests of the State of Kansas lie in the observance of fair play and in the preservation of the principle that no citizen should be denied the right to a full and fair hearing before an impartial tribunal on his contention that his interests are threatened by official action that has no warrant in law.

Respectfully submitted,

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